NO. 07-18-00374-CR
NO. 07-18-00375-CR

IN THE
COURT OF APPEALS
SEVENTH DISTRICT OF TEXAS

DARREN LAMONT BIGGERS — **APPELLANT**

V.

THE STATE OF TEXAS — **APPELLEE**

THE APPELLANT'S BRIEF

APPEALED FROM CAUSE NUMBERS CR17-00072 & CR17-00073 IN THE 235th DISTRICT COURT OF COOKE COUNTY, TEXAS

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STATEMENT OF THE CASE

Appellant, Darren Lamont Biggers, was charged by indictment with Tampering with Evidence in Cause Number CR17-00072, alleged to have occurred on or about February 7, 2017 in Cooke County, Texas. (CR72 at 5, SCR72 at 104).[1]

Appellant, Darren Lamont Biggers, was charged by indictment with Possession of a Controlled Substance, Penalty Group 4, in an amount greater than 400 grams in Cause Number CR 17-00073 alleged to have occurred on February 7, 2017 in Cooke County, Texas. (CR73 at 5, SCR73 at 158)

The cases were consolidated for trial. (SCR73 at 150). Appellant pled not guilty. The jury found the appellant guilty of both charges. After finding the two enhancement paragraphs contained in each indictment true, the jury sentence the appellant to 99 years confinement Texas Department of Criminal Justice in Cause Number CR17-00072 (CR 72 at 23) and 60 years confinement Texas Department of Criminal Justice in Cause Number CR17-00073 (CR73 at 23). This appeal followed.

[1] Citations to the record are as follows: clerk's record (CR [Cause Number] at [page number]); supplemental clerk's record (SCR at page number; reporter's record, ([Roman numeral volume number] RR at [page number]); supplemental reporter's record, ([Roman numeral volume number] SRR at [page number]); exhibits, (SX or DX [exhibit number]).

STATEMENT OF FACTS

1. The indictment

Paraphrased, the indictment in cause number CR17-00072 alleges that on or about February 7, 2017 the appellant, knowing that an investigation was in progress, to wit: a drug investigation, did intentionally or knowingly alter, conceal, or destroy an unknown substance with intent to impair its availability as evidence in any subsequent investigation or official proceeding related to the offense. (SCR72 at 104).

Paraphrased, the indictment in cause number CR17-00073 alleges that on or about February 7, 2017 the appellant did then and there intentionally and knowingly possess a Penalty Group 4 controlled substance, namely, a compound, mixture, or preparation in an amount of 400 grams or more, that contained not more than 200 milligrams of codeine per 100 milliliters or 100 grams and one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. (SCR73 at 127)

2. Pre-trial hearing

A hearing was held on the Appellant's Motions to Suppress on March 12, 2018. (II RR at 5). Investigator **Matt Maiden** ("Maiden"), an investigator with the Cooke County Sheriff's Office was called by the State at the hearing on the motion. Maiden, with the assistance of a confidential informant, made a telephone call to the appellant arranging for the informant to make a purchase of methamphetamine from the appellant. (II RR at 24-25). Other officers who were to assist in the investigation were in a marked unit. (II

RR at 26). An agreement was made between the informant and the appellant to meet in the parking lot of the Dollar General for the transaction. The informant identified the appellant in a vehicle and the information was relayed to deputies in the marked unit so they could make contact with the appellant. (II RR at 30). Maiden left the area to drop off the information and when he returned other deputies had conducted the investigation. Maiden observed the appellant at the scene. (II RR at 31). After the traffic stop and the investigation the appellant was arrested. (II RR at 32).

Under cross-examination, Maiden testified the appellant had not been observed committing a traffic offense. The traffic stop was conducted because the appellant was supposedly in the act of a drug transaction, though no methamphetamine was found on the appellant. (II RR at 36).

Deputy **Marc Parsons** ("Parsons") was also called as a witness for the State at the hearing on suppression. Parsons was advised by Maiden that an alleged drug transaction was going to be conducted and asked that he be in the area to make contact with the suspect. After getting a vehicle and suspect description from Maiden, Parsons observed the vehicle backing out of the Dollar General parking lot and made an investigative stop. (II RR at 38). Parsons had been informed by Maiden the appellant was allegedly in the process of making a delivery of Methamphetamine. (II RR at 39).

Parson's approached the appellant on the passenger side of the vehicle and immediately noticed the smell of marijuana from the vehicle. (II RR at 40). Parsons also observed a Sprite bottle and white Styrofoam cup in the console between the driver and the passenger. He observed a purple liquid in the containers he believed to be "lean"—or

codeine cough syrup. (II RR at 40-41). Parsons believed he had been granted permission to search the vehicle, but could not remember specifically. Nevertheless, he felt he had probable cause to search the vehicle due to the smell of marijuana. (II RR at 44-45). Parsons did not find anything else in the vehicle aside from the "lean." (II RR at 44). Both the appellant and driver of the vehicle were placed under arrest. (II RR at 45).

Under cross-examination Parsons testified he stopped the vehicle because a drug transaction was taking place. (II RR at 46). He did not provide the appellant his *Miranda* warnings. He also testified that he had neither an arrest warrant nor a search warrant. (II RR at 47).

3. Trial

Shane Norie ("Norie") was the first witness called by the State at the trial of this cause. At the time of the investigation Norie was the supervisor of narcotics with the Cooke County Sheriff's Office. (IV RR at 21). On the date of the offense alleged in this case, the confidential information, Billy Ray Jefferson ("Jefferson"), was arrested by another officer and Jefferson told the officer he could possibly arrange a drug transaction. The plan was to make a phone call to the appellant and have him deliver methamphetamine to the Dollar General. (IV RR at 26). Jefferson identified the appellant as a potential supplier of methamphetamine. Jefferson called the appellant and got him to agree to meet him at the Dollar General for the transaction. (IV RR at 27).

Norie testified that after the transaction had been arranged Jefferson identified the appellant in a vehicle. After this occurred, Norie radioed to Parsons and told him the suspect vehicle was at the Dollar General and they were going try and get it stopped. The

appellant was in the passenger seat and another individual was driving the vehicle (IV RR at 35). Norie stated that an investigation was ongoing at the time of the stop and that any evidence destroyed would have been part of said investigation. (IV RR at 41-42).

Under cross-examination, Norie indicated that there was no methamphetamine located during the search of the vehicle. Also, there were no bags, pill bottles, or anything else where Methamphetamine may be stored. (IV RR 53).

Deputy Marc Parsons testified again during the trial of this cause. Parsons testified he became involved in the case involving the appellant in February of 2017 when he was asked to assist Maiden. (IV RR at 73). He was told there was to be a drug transaction take place and he was asked if he could stop the individual involved. He believed they were working with an informant, but he was not certain. (IV RR at 74). Parsons was told the transaction was to take place at the Dollar General and was waiting down the road. He was waiting for a dark-colored sedan. Eventually he was told by Maiden the vehicle had arrived and he stopped it when he was instructed to do so. (IV RR at 76). He conducted a stop on the vehicle. He did so because he was told there was an individual inside in the process of making a delivery of methamphetamine. (IV RR at 77).

Parsons approached the vehicle on the passenger side and immediately smelled a strong odor of marijuana coming from inside the vehicle. Eventually both individuals were removed from inside the vehicle. Once the individuals were removed from the vehicle Parsons observed a Styrofoam cup and a bottle inside the cup-holder he observed to contain a purple liquid. (IV RR at 78). He believed the substance was codeine mixed with Sprite—referred to as "lean." He also observed a one-hundred-dollar bill in the

floorboard of the vehicle which he believed to be out of place. The passenger of the vehicle was the appellant—Darren Biggers. (IV RR at 79).

Parson's questioned the appellant about the owner of the "lean" and the appellant told him he had a prescription for the cough syrup. (IV RR at 80). The appellant later changed his story and said it was over-the-counter medication. (IV RR at 80-81). The driver of the vehicle gave Parsons consent to search the vehicle. (IV RR at 86). Both the driver of the vehicle and the passenger were arrested, and the vehicle searched. No methamphetamine was found in the vehicle. (IV RR at 87). Parson believed there was a lot of movement in the vehicle when he was attempting to conduct the traffic stop. (IV RR at 89).

Under cross-examination Parsons confirmed that, along with not finding methamphetamine in the vehicle, they also did not locate any containers, such as baggies, which are typically used to carry narcotics. (IV RR at 96). Also, he didn't locate any contraband on the ground outside of the vehicle. (IV RR at 97).

Mallory Jenkins ("Jenkins") from the DPS Crime Laboratory was also called by the State. Jenkins was a forensic scientist dealing with controlled substances and she analyzed the evidence in the present case. (IV RR at 107, 114). Jenkins testified her observation that when she initially opened the exhibits in this case, they had an odor of cough syrup or something like cough syrup. (IV RR at 120). After testing Jenkins determined the exhibits contained codeine and promethazine. (IV RR at 121). She stated that codeine is a narcotic analgesic and promethazine is an antihistamine and that the two paired together are usually seen in cough syrups. (IV RR at 123).

Upon cross-examination Jenkins testified she did not quantify the ingredients in the tested substances. She performed only a qualitative analysis—confirming the identity of the substance. (IV RR at 138-139). She also stated that her testing did now allow her to determine that there was no more than 200-milligrams of codeine her 100 milligrams in the mixture. (IV RR at 140).

Maiden also testified again for the State during the trial of this cause. Maiden assisted Norie in conducting an investigation into the appellant. (IV RR at 150). He was with Norie in the vehicle with the informant. He did not arrive at the location of the stop until after the search had been conducted. (IV RR at 151). During Maiden's testimony, jail calls that purported to be of the appellant were entered into evidence and played for the jury. (IV RR at 167) (SX 11-12). According to Maiden, on the recording the appellant states that he "ate everything" and that the appellant is referencing ingesting narcotics orally when he made that statement. (IV RR at 171).

Bill Dixon ("Dixon") was called as a witness by the appellant. Dixon was a deputy with the Cooke County Sheriff's Office at the time of this investigation. Dixon was with Parsons and was there to watch the individuals in the car during the investigation. (V RR at 16). Dixon did not participate in the search of the vehicle or of the passengers but did not believe any methamphetamine was found in the vehicle. (V RR at 20).

The appellant also called the informant, **Billy Ray Jefferson** ("Jefferson"), as a witness at trial. Jefferson confirmed he had been stopped by law enforcement on the day of the appellant's arrest and he had marijuana on him at that time. (V RR at 29). Law

enforcement asked him if he could get some methamphetamine, and he told them that he could. They did not suggest who he call. (V RR at 30). He made the call to the appellant because he was upset the appellant had sold drugs to his pregnant girlfriend. (V RR at 35). It had nothing to do with the marijuana arrest on that date. (V RR at 36).

SUMMARY OF THE ARGUMENTS

Summary of Issue 1:

The chemist's testimony was insufficient to prove the codeine was a compound containing not more than 200 milligrams of codeine per 100 milliliters or 100 grams. The chemist's testimony was also insufficient to prove the nonnarcotic medicinal ingredient was in sufficient proportion to confer on the mixture valuable medical qualities other than those possessed by the codeine alone. Consequently, the evidence is insufficient to sustain the appellant's conviction for Possession of a Penalty Group 4 controlled substance.

Summary of Issue 2:

The State relied on an extrajudicial confession to support the appellant's conviction for tampering with evidence. There was no independent corroboration of the confession showing the crime had actually been committed. The evidence is, therefore, insufficient to sustain appellant's conviction for tampering with evidence.

APPELLANT'S FIRST POINT OF ERROR

The evidence is legally insufficient to support the Appellant's conviction for the offense of Possession of a Controlled Substance.

UNDERLYING FACTS

The Appellant relies on the above summation of the facts.

ARGUMENT AND AUTHORITIES

1. Standard of Review

When reviewing the legal sufficiency of the evidence, the court should review all the evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App.2010) citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A court should examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury to "fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hutchinson v. State*, 424 S.W.3d 164, 170 (Tex.App-Texarkana 2014) citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App.2007).

2. Possession of a Controlled Substance

The State had the burden to prove the Appellant "intentionally or knowingly possess[ed] a Penalty Group 4 controlled substance, namely, a compound, mixture, or preparation in an amount of 400 grams or more, that contained not more than 200 milligrams of codeine per 100 milliliters or 100 grams and one or more nonnarcotic

active ingredients in sufficient proportions to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone " (SCR73 at 127). See also TEX. HEALTH & SAFETY CODE § 481.105(1).

3. The evidence was legally insufficient to prove the substance was a Penalty 4 controlled substance

The State is required to prove the appellant possessed codeine as specifically defined in Penalty Group 4, because each penalty group set out on the Health and Safety Code contain entirely distinct and separate lists of contraband, each with its own distinct chemical makeup. *Dudley v. State*, 58 S.W.3d 296, 298 (Tex.App.- Beaumont 2001). Having charged the appellant with possession of Codeine listed in Penalty Group 4, the State was obligated to elicit evidence sufficient to prove his possession of codeine as specifically defined by § 481.105(1), which defines codeine as a 200 milligram to 100 milliliter (or 100 gram) concentration ration when mixed with the required "nonnarcotic active medicinal ingredients." *Id* at 299. TEX. HEALTH AND SAFETY CODE § 481.105(1).

a. The evidence was insufficient to prove the codeine was a compound containing not more than 200 milligrams of codeine per 100 milliliters or 100 grams

The State is not required to prove specific quantities of codeine or promethazine in a specific substance. *Id.* at 300. Evidence has been held sufficient where a chemist has testified the codeine/promethazine mixture was a combination typically found in concentrations of 200 milligrams of codeine per 100 milliliters of syrup. *Id.* Evidence has also been held sufficient where the chemist testified that usually, in cough syrups, the

concentration of codeine will be 200 milligrams per 100 milliliters and that the chemist had not seen any cough syrups with a higher concentration of codeine. *Sanchez v. State*, 2010 WL 2545574, *9 (Tex.App.-Houston [1st. Dist] June 24, 2010) (not designated for publication). The testimony of the chemist in the present case, however, does not contain such testimony as to sufficiently prove the required concentration.

Jenkins testified the substance tested in this case contained both codeine and promethazine. (IV RR at 121). She also testified that codeine is a narcotic analgesic and promethazine is an antihistamine and that they are commonly paired together in cough syrups. (IV RR at 123). Jenkins had no personal knowledge as to whether cough syrups normally contain not more than 200 milligrams of codeine per 100 milliliters. (IV RR at 133). Further, when specifically asked by the prosecutor if the substance tested could be in the required proportion and that it appears to be cough syrup she declined to answer in the affirmative. Jenkins stated that she could only testify the substance contained codeine and promethazine and that it smelled similar to cough syrup. (IV RR at 134).

While proof of specific quantities of codeine and promethazine is not required, in cases where evidence has been held sufficient the chemist has been able to testify that codeine and promethazine are typically in mixtures containing not more than 100 milliliters of codeine per milligrams or 100 grams. *Dudley v. State*, 58 S.W.3d at 399. Jenkins did not have the personal knowledge to compare the substance in the present case with other substance of specific concentrations. The totality of Jenkins' testimony shows she did not have the knowledge that cough syrups typically contain not more than 200 milligrams of codeine per 100 milliliters and when asked by the prosecutor she was not

willing to testify as such. Her testimony was, therefore, insufficient to prove the substance in this case contained not more than 200 milligrams of codeine per 100 milliliters.

b. The evidence was not sufficient to prove the nonnarcotic medicinal ingredient was in sufficient proportion to confer on the mixture valuable medical qualities other than those possessed by the codeine alone

The mere presence of a nonnarcotic active medicinal ingredient is not sufficient to establish that the mixture falls within Penalty Group 4. The nonnarcotic ingredient must be in sufficient proportion to convey on the mixture valuable medicinal qualities other than those possessed by the narcotic alone. TEX. HEALTH AND SAFETY CODE § 481.105(1). The evidence at trial showed only the mere presence of promethazine.

Jenkins testified promethazine is a nonnarcotic. She also testified it is an active medicinal ingredient. The prosecutor asked her whether promethazine has valuable medicinal qualities other than those possessed by codeine alone. (IV RR at 135). After an objection by counsel for the appellant, the prosecutor asked instead if promethazine adds something to the mixture medicinally. She responded that it appears to but that she could not say for sure. (IV RR at 136).

The testimony adduced in this case is similar to that in *Miles v. State.* In *Miles,* the court found the evidence insufficient where testimony contained no implications supporting a finding with respect to the therapeutic or medicinal qualities, or lack thereof, of the amount or concentration of the promethazine In the particular substance seized and tested in the case. *Miles v. State,* 357 S.W.3d 629, 638 (Tex.Crim.App.2011). In *Miles,* as in the present case, the chemist testified only that promethazine is most often found

with codeine and that is is an antihistamine. The court in *Miles* compared the testimony to the testimony in *Sanchez v. State* where it held the evidence to be sufficient. In *Sanchez*, the testimony from the chemist was that promethazine on its own had a valuable medicinal quality. The court went on to say it found the evidence sufficient in that case because the testimony established the presence of promethazine on its own had a valuable medicinal quality, which supported a finding that the promethazine was in sufficient proportion to confer on the substance valuable medicinal qualities. *Id.* See *Sanchez v. State*, 275 S.W.3d 901 (Tex.CrimApp.2009).

Like *Miles*, and unlike *Sanchez,* there is no testimony by Jenkins that promethazine on its *own* has valuable medicinal quality. When specifically asked by the prosecutor a question along those lines, she stated it appeared so, but that she could not say for sure. When the prosecutor followed up on her noncommittal answer and asked her whether or not it was in there for a reason, she stated she could only assume. (IV RR at 136) This testimony is not sufficient for a rational jury to find the promethazine was in sufficient proportion to convey on the mixture valuable medicinal qualities other than those possessed by the narcotic alone. *See Miles.*

The judgment of the court should be reversed an a judgment of acquittal entered.

APPELLANT'S SECOND POINT OF ERROR

The evidence is legally insufficient to support the Appellant's conviction for the offense of Tampering.

UNDERLYING FACTS

The Appellant relies on the above summation of the facts.

ARGUMENT AND AUTHORITIES

1. Standard of Review

When reviewing the legal sufficiency of the evidence, the court should review all the evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App.2010) citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A court should examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury to "fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hutchinson v. State*, 424 S.W.3d 164, 170 (Tex.App-Texarkana 2014) citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App.2007).

2. Tampering

The State had the burden to prove the Appellant "knowing that an investigation was in progress, to wit: a drug investigation, intentionally or knowingly alter, conceal, or detroy an unknown substance with intent to impair its availability as evidence in any subsequent investigation or official proceeding related to the offense. (SCR71 at 158).

See also TEX. PENAL CODE § 37.09.

3. The evidence was legally insufficient to prove the appellant altered, concealed, or destroyed an unknown substance

Under the *corpus delicti* rule, when the State relies on an extrajudicial confession of the accused to support a conviction, there must be independent corroboration evidence showing that a crime has actually been committed. *Fisher v. State,* 851 S.W.2d 298, 302-03 (Tex.Crim.App.1993). When the burden of proof is beyond a reasonable doubt, a defendant's extrajudicial confession, standing alone, is not legally sufficient evidence of guilt. *Dansby v. State,* 530 S.W.3d 213, 224 (Tex.App.-Tyler 2012). Corpus Delecti simply means the crime itself, and is a requirement imposed on the State to prevent the possibility of a defendant being convicted of a crime based solely on his own false confession to a crime that never occurred. *Fisher,* 851 S.W.2d at 303.

The State relied heavily on a phone call the appellant made in jail wherein he stated in part, "so you know I do what any other nigga would do and I eat everything." (SX 12). There is no mention on the recording the appellant specifically had methamphetamine in the car at the time of the stop. The evidence is not sufficient to corroborate the appellant's extrajudicial confession. Law enforcement, with the assistance of an informant, placed a call to the appellant asking to make a purchase of methamphetamine. A location was agreed upon for the transaction and the appellant appeared as a passenger in a vehicle at that location. (IV RR at 35) While the appellant's appearance may be some evidence that he, *at some point*, intended to engage in a narcotics transaction with the informant, the record is void of *any* evidence the appellant

arrived with (or tampered with) methamphetamine *at the time of the stop*.

A search of the vehicle in which the appellant was a passenger did not turn up any methamphetamine. (IV RR at 87). Likewise, the search also did not turn up any evidence methamphetamine had been in the car. There were no baggies or other containers, or residue found. (IV RR at 96). Also, no contraband was located on the ground outside of the vehicle. (IV RR at 97). Law enforcement made no attempt to determine if the appellant had swallowed any substances.[2]

Simply arriving at the store in response to the informant's call is not sufficient proof the appellant did so possessing methamphetamine. It's possible the appellant intended to first collect the money from the informant before providing methamphetamine at a later time or date. In any event, the evidence is not sufficient to corroborate the appellant's extrajudicial confession he "ate" some substance. See *Dansby v. State*, 530 S.W.3d at 224. The evidence is therefore insufficient to support the appellant's conviction for the offense of tampering.

The judgment of the court should be reversed an a judgment of acquittal entered.

[2] Law enforcement did not appear to suspect the appellant committed the offense of tampering until after the phone call was discovered, further support for the fact that no proof existed the appellant possessed methamphetamine when he arrived at the store.

PRAYER

WHEREFORE, the Appellant prays that this court reverse the conviction of the trial court and render a verdict of not guilty. In the alternative the Appellant prays this court reverse the conviction of the trial court and remand this case for a new trial or any other relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 14th day of June, 2019 a copy of the Appellant's brief was delivered to the Cooke County District Attorney's Office.

\s\ Jeromie Oney
JEROMIE ONEY

CERTIFICATE OF COMPLAIANCE

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 4,156 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

\s\ Jeromie Oney
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